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Chapter 27: Administration of Justice

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C H A P T E R 27

Administration of Justice

RICHARD H. FIELD

The goal to which any effective procedural system must aspire is, in the words of the Federal Rules, "to secure the just, speedy, and inexpensive determination of every action."¹ In appraising the administration of justice in Massachusetts the current tendency is to be more preoccupied with the speed of justice than with the quality of the product. The bar, the public, and the legislature have been increasingly concerned over the law's delays, and in the last legislative session the only significant enactments in the field of judicial administration were aimed at relieving the intolerable congestion in the Superior Court. Other legislative proposals which looked to the same end failed of passage. Even those whose ostensible purpose was to improve the quality of justice were commonly supported by the argument that they also would speed up the process. It is only natural, therefore, that this chapter should be devoted primarily to the problem of court congestion and an examination of the year's legislative efforts, successful and unsuccessful, to improve the situation.

A. THE BUSINESS OF THE COURTS

§27.1. Judicial statistics. The best source of information as to how our courts are managing their business is the statistics collected and published by the Judicial Council in its annual reports.¹ Although the Massachusetts statistics have been deservedly praised as "among the very best in the country,"² a cautionary word is called for. They show on their face internal inconsistencies; it appears that the clerks compiling them for their respective counties do not use the same methods, and some information essential to a proper appraisal of the work of the courts is not elicited. There is also the danger, inherent in the use

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¹ Fed. R. Civ. P. 2.

² §27.1. ¹ The statistics used in the tables which follow have been taken from the Reports of the Judicial Council of Massachusetts, which are published annually as Public Document 144.

² Vanderbilt, *Minimum Standards of Judicial Administration* 72 (1949).

of statistics generally, that erroneous inferences may be drawn from the figures. Nevertheless, they do paint in broad strokes a fair picture of the way the judicial business of the Commonwealth is being handled.

§27.2. **The Superior Court.** Since court congestion is primarily a Superior Court problem, the statistics of the Supreme Judicial Court, the Probate Court, and the Land Court can for present purposes be ignored. The statistics of the District Courts and the Municipal Court of the City of Boston must, however, be considered because of their concurrent jurisdiction with the Superior Court in civil cases.

The increase in the backlog of pending civil cases in the Superior Court in the last five years is graphically demonstrated by the following table:

TABLE I¹

Superior Court Business

Year	1949-50	1950-51	1951-52	1952-53	1953-54
Undisposed of cases beginning of year	47,139	51,388	56,318	59,837	59,504
Entries during year	30,115	30,056	31,587	33,060	33,946
Dispositions during year	25,979	25,614	27,990	34,045	29,015
Undisposed of cases end of year	51,394	56,328	60,043	60,445	64,027

These figures reveal the continuation of a trend which has been evident since the end of World War II. At the end of the year 1945-1946 there were 30,758 cases pending, but that number has now more than doubled. The excess of entries over dispositions in the last five years is as follows: 1950, 4136; 1951, 4442; 1952, 3597; 1953, -985; 1954, 4931.² Such hope as there was a year ago that the trend was arrested, when for the first time since the war dispositions exceeded entries, was dissipated in the past year by the poorest showing since 1949.

The Chief Justice of the Superior Court has the responsibility of assigning the thirty-two justices of the court to criminal, civil jury, and civil nonjury sessions in the manner best calculated to promote efficient judicial administration. Much of the pressure on the criminal list has

§27.2. ¹ This table, taken from the Judicial Council's compilations, shows obvious discrepancies. First, the cases pending at the end of one year should be the same as those pending at the beginning of the next year. Second, the cases pending at the beginning of the year, plus new entries, minus dispositions, should equal the cases pending at the end of the year. In neither respect do the figures come out correctly, the discrepancies being the greatest in the last two years; but these errors do not significantly affect the conclusions to be drawn from the tables.

² If, instead of entries minus dispositions, the number of cases pending at the end of the year minus the number pending at the beginning of the year were taken, the resulting figures would be different, but the general pattern would be substantially unchanged.

been relieved by the use, authorized by statute since 1923,³ of District Court judges in misdemeanor cases. The allocation of Superior Court justices among the three types of work for the past five years has been as follows:

TABLE II

Days in Which Superior Court Judges Sat

	1949-50	1950-51	1951-52	1952-53	1953-54
Civil Jury	3117	3034	2952	3078	2806
Nonjury	1425	1518	1514	1516	1573
Criminal	1117	1069	1100	1069	1120
Total days	5659	5621	5566	5663	5499
District Judges in Superior Court	368	311	266	351	413

These figures show that in the past year Superior Court justices spent 51 percent of their time in civil jury sessions, 28.6 percent in nonjury sessions, and 20.4 percent in criminal sessions. The average number of days in the year that Superior Court justices sat was 172. It will be noted that in the last two years the successful effort to keep the criminal docket relatively current has led to an increase in the use of district judges in the Superior Court. Last year they accounted for 26.9 percent of the criminal workload.

A comparison of the tables of "Number of Trials — Cases Tried" and "Cases Finally Disposed Of" indicates that only 3424 of the 29,015 dispositions, or 11.8 percent, came as the result of a trial. These figures cannot be taken at face value,⁴ but it is nevertheless plain that the percentage of cases tried to a conclusion is small. If this were not so, the administration of justice would break down completely.⁵ Hidden in the number of "Cases Finally Disposed Of" and unexplained by the other statistics lies information vital to an understanding of court congestion. Cases defaulted for failure to answer, cases settled shortly after the parties are at issue, and cases allowed to rest on the docket with no serious intention on anyone's part to do anything further about them⁶

³ Acts of 1923, c. 469. After being continued on a temporary basis until 1949, this authorization was then made permanent. Acts of 1949, c. 210.

⁴ The figures are not uniformly kept. In some counties the number of trials listed each year is much greater than the number of verdicts, and in other counties it is much smaller. Seemingly the difference lies in the statistical treatment given to cases which are settled during trial. In Suffolk County, for instance, a case is recorded as tried only if it is tried to a conclusion, but the figures indicate that in some counties trial settlements must be included as "Cases Tried." Another possible difference is in recording verdicts in cases with multiple parties.

⁵ In 1953-1954 there were 33,946 cases entered and 3424 reported as tried.

⁶ These cases are eventually dismissed under the inactive rule. The shortening of the period before the dismissal of an inactive case from six years to four years, effective in 1954, will speed the elimination of such cases from the docket. Superior Court Rule 85 (1954).

cause no significant delay to parties eagerly awaiting trial. Unless isolated and explained, however, they distort the statistics and produce a false picture of the state of congestion.

The significant figure is the number of cases in which settlement is precipitated by actual jury trial or its imminence. On this point the Judicial Council's statistics are unrevealing. The clerk's office for Suffolk County has, however, at the request of the writer, made some additional compilations which help to clarify the situation as follows:

Total jury cases settled in all sessions before trial	1008
Total jury cases settled in all sessions during trial	277 ⁷

To complete the picture, there were 962 cases settled at pretrial and 906 cases settled after pretrial while awaiting assignment to a trial session.⁸ This produces a total of 3153 jury cases settled at pretrial or thereafter, as compared to 7945 jury cases finally disposed of.⁹

These facts point up the desirability of finding procedural devices which will, at an earlier time and less expense, generate settlement pressures comparable to the approach of trial or, failing that, will at least bring the parties together in an atmosphere conducive to settlement. Herein lies the chief appeal of such proposals as that allowing oral depositions of parties.¹⁰

The true measure of congestion is the time a litigant who wants a trial has to wait for it in the ordinary course of events, and this is not disclosed by the presently available statistics.¹¹ It would seem desirable for the Judicial Council to ascertain and publicize this information, not only to bring to public attention the seriousness of congestion but also to guide lawyers in their choice of court or venue.¹² The Council would also be well advised to require a report of the number of cases advanced for speedy trial either by statutory mandate¹³ or on motion for cause shown.¹⁴ Since each case given such priority delays other cases, the extent to which court time is devoted to them has an important bearing on congestion. Disclosure of the facts might well suggest the wisdom of reappraising the grounds for speedy trial.

⁷ In addition, 218 jury-waived cases were settled before and 27 during trial.

⁸ Nonsuits and defaults at pretrial disposed of 325 additional cases, and in 422 cases jury was waived at pretrial.

⁹ Jury cases totaling 474 were tried to a conclusion.

¹⁰ See Section 27.16 *infra*.

¹¹ The Institute of Judicial Administration has published this information in regard to Suffolk and Worcester Counties. The figures given by the Institute list Suffolk as having a delay of 34 months and Worcester 42 months. See Section 27.5 *infra*. The figures were obtained by disregarding cases advanced for speedy trials and averaging the waiting time for the remainder of the cases tried during the year.

¹² This information was given in the First Report of the Judicial Council 122 (1925).

¹³ See Superior Court Rules, 1954, Annotated, Note to Rule 63, for the classes of such cases.

¹⁴ G.L., c. 231, §59A provides for advance on motion, but the court has inherent power to advance cases in its discretion. *Taft v. Thomajan*, 249 Mass. 299, 144 N.E. 228 (1924).

§27.3. The District Courts. The Administrative Committee for the District Courts collects and publishes, through the Judicial Council, statistical information on the operations of these courts.¹ The over-all totals reveal no startling change in the volume of civil business, apart from small claims, over the last five years, but criminal business and small claims have markedly increased. The figures are as follows:

TABLE IV

District Court Business

<i>Writs Entered</i>	<i>1949-50</i>	<i>1953-54</i>
Civil	55,702	57,109
Removals to Superior Court	3,969	3,998
Criminal Cases Begun	155,398	202,334
Small Claims	54,962	73,182

It appears that increased congestion in the Superior Court has not diverted any substantial volume of business to the District Courts. The increase in small claims, which last year for the first time was substantially greater than the entries of original writs, is probably due in a large measure to the increase of the jurisdictional limit from \$50 to \$75, which was effective on July 1, 1953.²

§27.4. The Municipal Court of the City of Boston. The statistics of the Municipal Court of the City of Boston show approximately the same pattern, a relatively static volume of civil cases and a large increase of criminal cases and small claims. The more detailed breakdown of these figures does, however, give an insight into the business of the court which the District Court statistics do not disclose. In 1954, for instance, 42.5 percent of the 18,671 civil entries in the Municipal Court were defaulted for failure to answer, and only 10.7 percent were tried to a conclusion. There has been no significant variance in these figures over the last several years. It is reasonable to assume that the District Court experience is comparable. This indicates the extent to which these courts are utilized to reduce to judgment claims to which there is no defense. The burden of this important function falls upon the clerk's office rather than upon the judges, as does, to a still greater extent, the ever increasing burden of small claims.

B. LEGISLATION AIMED AT RELIEVING CONGESTION

§27.5. Background on the problem of congestion. It is frequently said, sometimes with an appearance of undue complacency, that con-

¹ Beginning in 1954 the District Court statistics will be reported on a July 1 to June 30 basis so that they will correspond with those of the Superior Court. Previously they had been reported on an October 1 to September 30 basis. Administrative Committee of the District Courts, Letter to the Justices, Clerks and Probation Officers of the District Courts 23 (August 12, 1954).

² Acts of 1953, c. 168.

gestion in the Superior Court is no new problem and that there have been times when it was more serious than it is today. The plain fact, however, as shown by Table I *supra*, is that the backlog of undecided cases is growing steadily larger. It is equally plain that the efforts to do something about it have so far resulted in much talk but little action. Indeed, there is an attitude of resignation in many quarters, as though nothing truly effective can be done short of such a drastic device as taking motor tort litigation out of the courts, a solution which most lawyers would deplore.

The high road to popularity in Massachusetts does not lie in pointing out that things are done better elsewhere, but surely it is relevant to this besetting problem of congestion to show that there are few places in the country where the law's delays are so serious as they are here. The Institute of Judicial Administration at New York University School of Law has compiled a calendar status study as of June 30, 1954, showing the average number of months elapsing in civil jury cases throughout the country from the time the case is at issue until it is referred for trial in normal course.¹ There are two Massachusetts counties listed among the ten where this average figure is more than 30 months: Worcester County with 42 months and Suffolk County with 34 months. Others on this list include four counties in New York City and Brooklyn; two courts in Cook County (Chicago), Illinois; Hartford County, Connecticut; and Hillsborough County (Manchester), New Hampshire. In contrast, in such metropolitan areas as Philadelphia, Baltimore, Detroit, St. Louis, Los Angeles, and San Francisco the average jury trial occurs less than a year after the parties are at issue.

Much has been written about the streamlined justice under the reformed procedure in New Jersey.² The Institute of Judicial Administration study is revealing in its comparison of the trial courts of general jurisdiction in Suffolk (pop. 896,615) and Worcester (pop. 546,401) Counties, Massachusetts, and Essex (pop. 905,949) and Hudson (pop. 647,437) Counties, New Jersey. The average time between issue and trial in each of the two New Jersey counties is 6 months, as compared with 34 and 42 months respectively in the Massachusetts counties. Although it is dangerous to rely too much on bare statistics, the disparity is so great as scarcely to admit any other conclusion than that New Jersey has succeeded in solving a problem that is still paralyzing justice in Massachusetts.³

The failure of Massachusetts to match other states in meeting the

§27.5. ¹ Institute of Judicial Administration, State Trial Courts of General Jurisdiction; Calendar Status Study — 1954 (June 30, 1954).

² See Vanderbilt, Clearing Congested Calendars, 39 Mass. L.Q., No. 4, p. 9 (1954).

³ Chief Justice Vanderbilt says that in the first year under the new system in New Jersey the Law Division of the Superior Court, with one less judge than its predecessor court, disposed of 98 percent more cases, and that the county courts with the same number of judges as before disposed of 77 percent more cases. In the second year the law courts increased their productivity by 20 percent over the first year. *Id.* at 12.

congestion problem has not been due to lack of concern for it. The Judicial Council has long and repeatedly sounded the warning,⁴ and articles in legal periodicals⁵ and the daily press have struck the same note. State and local bar associations have made relief from court congestion a primary objective. Numerous bills to this end were introduced in the 1954 legislature, and the hearings before the Joint Judiciary Committee reflected the general concern over the problem. But the hard fact remains that the tangible accomplishments so far have been small indeed.

§27.6. Re-enactment of the Fielding Act. On the recommendation of the Judicial Council the legislature re-enacted the Fielding Act, requiring the entry of all motor vehicle tort actions in the District Courts.¹ The act gives the right of removal to the Superior Court to both plaintiffs and defendants. It compels a plaintiff who wants his case tried in the Superior Court to enter it in the District Court and immediately remove it. It was originally enacted in 1934 with the hope that many of the cases would be left in the District Courts and to that extent relieve Superior Court congestion. After it had been in operation for nine years it was repealed. Repeal was recommended by the majority of the Judicial Council in its Eighteenth Report (1942) on the ground that it had failed of its purpose.

On the face of things, it may appear unlikely that any significant number of plaintiffs who want a trial in the Superior Court would leave their cases in the District Court merely because they must be originally entered there. Nevertheless, the statistics appear to demonstrate that such is the case. It is a fact that the number of removals was high when the Fielding Act was in effect, but the true test of its effectiveness is the comparison of the percentage of cases eventually winding up in the Superior Court under the two systems.

Selecting as typical of the experience under the Fielding Act the last full year during which it was in operation, 1941-1942, analysis shows that 40.9 percent of the motor vehicle tort cases entered wound up in the Superior Court. In 1953-1954, 52.3 percent of such cases were

⁴8th Rep. 8 (1932); 9th Rep. 11 (1933); 28th Rep. 7 (1952); 29th Rep. 6 (1953).

⁵The most penetrating recent discussion is Dimond, *Congestion in the Superior Court Since Its Creation in 1859 and Proposals for Relief*, 38 Mass. L.Q., No. 2, p. 95 (1953). Other recent articles include *Congestion in the Superior Court*, 38 id., No. 5, p. 5 (1953); *Twenty-ninth Report of the Judicial Council — Congestion in the Superior Court and Other Matters*, id. at 37; Grinnell, *Traffic Jam in the Courts: A Revival of Proposal for a Commission for Automobile Damage Cases by a New York Judge and a Reminder of Earlier Discussions in Massachusetts*, 39 Mass. L.Q., No. 1, p. 6 (1954); Doyle, *Traffic Jam in the Courts from the Point of View of the Insurance Industry*, id. at 9; Grinnell, *Blind Pleading and Practice — A Cause of Delay and Congestion*, 39 Mass. L.Q., No. 2, p. 6 (1954).

¹§27.6. ¹Originally enacted, Acts of 1934, c. 387; repealed, Acts of 1943, c. 296; re-enacted, Acts of 1954, c. 616. Re-enactment was recommended (Judge Donahue dissenting) in the Twenty-eighth Report of the Judicial Council 15 (1952) and the Twenty-ninth Report of the Judicial Council 9 (1953).

either entered in or removed to the Superior Court.² This difference in percentages suggests that if the Fielding Act had been in force last year there would have been 3854 fewer new motor tort cases in the Superior Court. Since Superior Court delay is now greater, it is reasonable to predict that there would be even fewer removals by plaintiffs than in 1941-1942. Plainly, however, this legislation is only a tiny thrust at the over-all problem of congestion.

Under the original Fielding Act the Superior Courts dismissed, as "arising out of the operation of a motor vehicle," cases which had been entered there either inadvertently or in the belief that the Fielding Act was inapplicable.³ Since dismissal seemed an unfair hardship, especially when the statute of limitations had run, the Judicial Council in 1942 recommended that if the Fielding Act were not repealed it should be amended to permit the Superior Court to transfer such cases to a proper District Court.⁴ The new Fielding Act does not provide for transfer to the District Court of cases erroneously entered in the Superior Court. Its jurisdictional language is broadened to "actions of tort arising out of the ownership, operation, maintenance, control or use of a motor vehicle."⁵ Identical language in the compulsory insurance law⁶ has given rise to considerable litigation.⁷ Therefore, it would still seem wise to amend the Fielding Act as suggested in 1942 to prevent it from being a trap for the unwary.

	1 Oct. 1941 to 1 Oct. 1942	1 Oct. 1953 to 1 Oct. 1954
² Motor Vehicle Torts		
Entries in District Courts	28,425	14,612
Entries in Boston Municipal Court	8,837*	4,619
Entries in Superior Courts		14,561**
Total Entries	37,262	33,792
Removals from District Courts	11,590	2,599
Removals from Boston Municipal Court	3,636*	515
Entries in Superior Courts		14,561**
	15,226	17,675
% of total entries originally brought in or removed to Superior Courts	40.9	52.3

* 1 Oct. 1941 to 1 Sept. 1942. The statistics for the Boston Municipal Court are reported on a calendar year basis but conversion to an October-to-October basis has been possible since statistics for the first nine months of the year (eight months in 1942) are also published by the Judicial Council.

** 30 June 1953, to 30 June 1954.

³ *Blair v. Boston Elevated Ry. Co.*, 301 Mass. 1, 16 N.E.2d 10 (1941); *Couto v. Trustees of New York, N.H. & H.R.R. Co.*, 312 Mass. 23, 42 N.E.2d 802 (1942); *Kennedy v. Consolidated Motor Lines, Inc.*, 312 Mass. 84, 43 N.E.2d 121 (1942).

⁴ 18th Rep. 35 (1942).

⁵ Acts of 1954, c. 616.

⁶ G.L., c. 90, §34A.

⁷ *Caron v. American Motorists Ins. Co.*, 277 Mass. 156, 178 N.E. 286 (1931); *Mallen v. Hartford Accident & Indemnity Co.*, 287 Mass. 262, 191 N.E. 394 (1934); *Perry v. Chysouras*, 319 Mass. 473, 66 N.E.2d 361 (1946).

§27.7. District Court judges in the Superior Court. In 1954 the legislature authorized the Chief Justice of the Superior Court, for a temporary two-year period, to call District Court justices to sit in the Superior Court with or without a jury in motor vehicle tort cases.¹ This legislation, which was sponsored by the Massachusetts Bar Association, authorizes the extension to motor vehicle cases of a practice which has been in vogue in misdemeanor cases on the criminal side since 1923.² In recent years District Court judges have been so extensively used in the criminal cases in the Superior Court that they have carried roughly one fourth of the criminal workload.³ It does not follow, however, that the present extension to motor vehicle cases will greatly relieve Superior Court congestion. The District Courts are not an inexhaustible reservoir of judges. The use of district judges in Superior Court criminal cases has already created something of a problem in District Court administration, a problem which can only be accentuated by broad use of the newly granted power.

The objective of this legislation is a laudable one, since it makes for a flexible use of judicial manpower. One advantage of an integrated judicial system is the ability to shift judges from court to court as need arises. This law is, however, scarcely consistent with another laudable objective, namely, the increase in public confidence in the District Courts so that more cases will be left there for adjudication instead of being removed to the Superior Court. It appears that the legislature acted wisely in making the present grant a temporary one.

§27.8. Jury fee. Once more the recommendation of the Judicial Council for the imposition of a jury fee was rejected by the legislature.¹ In its Twenty-ninth Report (1953) the Judicial Council recommended a \$15 jury fee.² The Council first suggested this means of reducing the number of claims for juries in 1932.³ Last year's statistics demonstrate the extent to which this expensive mode of trial is insisted upon in small cases. Over 30 percent of the plaintiff's verdicts in motor tort cases were for \$500 or less, and over 50 percent were for \$1000 or less. The corresponding percentages for other types of jury cases were only slightly less. The statistics cannot reveal in how many of these cases there may have been a reasonable expectation of a substantial recovery. But it must be apparent that in a very large proportion of the jury cases the cost to the taxpayer of having a jury trial⁴ exceeds the amount of any verdict reasonably to be expected.

In other states the imposition of jury fees has greatly reduced the

§27.7. ¹ Acts of 1954, c. 668.

² Acts of 1923, c. 469; Acts of 1949, c. 210.

³ See Section 27.2 *supra*, Table II.

§27.8. ¹ House No. 2631 (1954).

² 29th Rep. 7.

³ 8th Rep. 18.

⁴ The Judicial Council has recently stated that an earlier figure of \$500 per trial is probably too low. 28th Rep. 12 (1952). In 1949 the compensation of a juror was increased from \$6 to \$8 a day. Acts of 1949, c. 335.

number of jury cases and thus relieved congestion in the courts. When the New York legislature imposed a \$25 jury fee in 1927, the reported result was a reduction of jury cases by 75 percent.⁵ In California there is the extreme requirement that the party claiming a jury trial must deposit before the first day of the trial the full amount of a day's compensation of the jurors and must repeat these payments at the beginning of each subsequent trial day.⁶ To point out this practice in California is not to recommend its adoption here, but it does indicate the reasonableness of a \$15 fee.

§27.9. Auditors in motor vehicle cases. In 1954 several bills were introduced to provide for auditors in motor vehicle tort cases but none were favorably reported out of committee.¹ These bills reflect impatience with current court congestion and the memory that the use of auditors in the period from May, 1935, to November, 1942, accomplished a great deal toward making the trial lists relatively current. The device was an expensive one, however, and the possibility of a double trial made it unpopular with many lawyers, both those representing plaintiffs and those representing defendants. The Judicial Council's statistics do not show how many of the cases originally heard by auditors were later tried before juries, but it is apparent that the number was relatively small. Large numbers of cases were settled before or during the auditor's hearing and many more were settled either shortly after the auditor's report or at least before the commencement of a jury trial. An airing of the facts before an auditor plainly furnishes the parties a good basis for appraising the settlement value of a case without the expense to the taxpayer of a jury trial.

An interesting variant to the auditor approach was proposed in 1954 in a bill providing for exclusive jurisdiction of motor vehicle tort cases in the District Courts, but without permitting removal to the Superior Court.² Instead, all cases were to be tried first in the District Court, the district judge's decision having the status of an auditor's report if a subsequent trial by jury in the Superior Court was demanded.

This proposal, which was rejected by the legislature, has some of the virtues and some of the vices inherent in the auditor system, but on the whole it seems preferable to that system, particularly if the objective of District Court reorganization with full-time justices hearing all civil cases should be achieved. That it would greatly relieve congestion seems obvious. If other methods fail, the public and the bar may some day be ready for this drastic medicine.

§27.10. Other proposals. Another proposal designed to relieve congestion in the Superior Court was the extension to the District

⁵ Twenty-eighth Report of the Judicial Council 12 (1952).

⁶ Cal. Code Civ. Proc. §631 (Deering, 1953). Jurors are paid \$3 a day and \$.15 a mile for transportation. *Id.* §196. For jury fees in other states, see Nineteenth Report of the Judicial Council 32 (1943).

§27.9. ¹ Senate No. 53 (1954); House No. 664 (1954); House No. 995 (1954); House No. 1462 (1954).

² House No. 994 (1954).

Courts of limited equity jurisdiction.¹ The matter was referred by the legislature to the Judicial Council.² The bill as introduced would give to the District Courts jurisdiction over equitable replevin and bills in equity by creditors to reach and apply property which cannot be reached by attachment in an action at law. This extension would be more desirable if District Court reorganization with full-time justices in civil cases should be effected.

Still another attack on congestion was a proposal for six-man juries in the District Courts and the Municipal Court of the City of Boston, with a provision that in any case brought in such court in which the plaintiff claimed a jury the defendant could not remove.³ These bills did not commend themselves to the legislature, perhaps because of practical difficulties coupled with doubts as to constitutionality.

The Judicial Council has for three years recommended a broadening of venue provisions for transitory actions in the District Courts.⁴ After recommitment of a bill embodying this recommendation,⁵ a new draft was reported and passed by the House but rejected by the Senate.⁶ The purpose was to reduce Superior Court litigation by making District Courts more attractive to plaintiffs. This seems an experiment worth trying, but its effect might not be great. A District Court more attractive to a plaintiff might be less attractive to a defendant, with a resulting increase in removals. Indeed, a significant reason why the District Courts do not handle more civil business seems to be that the bar tends to class some District Courts as "plaintiff courts" and others as "defendant courts."⁷ In the first instance, defendants avoid them by removal, and in the other, plaintiffs avoid them by instituting their actions elsewhere. A reorganization of the District Courts would probably do much more to relieve this situation than would the mere widening of the choice of districts open to a plaintiff.⁸

C. PROPOSED COURT REORGANIZATION

§27.11. **District Court reorganization.** The two-year effort to effect a broad reorganization of the District Courts failed for the second time in the closing hours of the legislative session. The initial impetus to this effort was furnished by the District Court Survey Committee, which was set up by the law schools of Massachusetts to study the problem.¹

§27.10. ¹ Senate No. 43 (1954).

² Resolves of 1954, c. 73.

³ House No. 2133 (1954).

⁴ 27th Rep. 34 (1951); 28th Rep. 21 (1952); 29th Rep. 11 (1953).

⁵ House No. 2630 (1954).

⁶ House No. 2755 (1954).

⁷ That such conceptions are prevalent was revealed by the frank comments on the questionnaire distributed by the Committee on the District Court Survey sponsored by the law schools of Massachusetts. See Section 27.11 *infra*.

⁸ See Section 27.11 *infra*.

§27.11. ¹ Senate No. 247 (1953); Senate No. 784 (1953). Urbano, Summary of the District Court Survey Committee's Report with Draft Act, 37 Mass. L.Q., No. 4, p. 25 (1952).

That committee sent questionnaires to the entire Massachusetts bar, and nearly 85 percent of the 1300 lawyers who replied favored a system of full-time justices in the District Courts.

The existing system under which most presiding justices and all of the special justices receive only a part-time salary and are free to practice law privately has long been criticized, most recently in the Report of the Special Commission Relative to the District Court System in 1947.² The only action taken by the legislature, however, was to make seven of the larger courts full-time, with salary increases of from \$2000 to \$3000 to the justices to compensate for their loss of private practice.³

The District Court Survey Committee proposed a much more drastic change than had previously been seriously considered. Its proposal had the long-range objective of substantially eliminating the part-time judge in the District Courts. The tenure of all present part-time judges was left undisturbed, but no new appointments would be made except upon a full-time basis (save in the three southern counties which were, for geographical reasons, exempted from the bill). Some 42 of the present part-time judges would be made full-time immediately, with their salaries increased to \$12,000. No existing courts would be abolished, but as incumbent judges died or resigned, full-time judges with salaries of \$12,000, operating on a circuit basis, would take over the work of their courts. Meanwhile, only full-time judges would hear civil cases other than supplementary proceedings, summary process, small claims, and proceedings relating to juveniles and insane persons.

This bill passed the Senate, with some amendments from the floor, but the House of Representatives substituted for it a Resolve for an investigation and study by a Special Commission.⁴ That Commission, consisting of Senate and House members and three lawyers appointed by the Governor, recommended legislation differing in material respects from the proposal of the preceding year.⁵

The most significant change was the abandonment of the long-range aim of doing away with part-time judges. The Commission's proposal would add 38 full-time judges at \$12,000, but the smaller courts would retain part-time presiding justices, for whom successors would be appointed as vacancies occurred. In addition, special justices would continue, and successors would be appointed to vacancies in courts where the presiding justice was made full-time. The number of special justices would slowly decline from the present 100 to an eventual maximum of 48. The Commission's recommendation adopted the prior

² Senate No. 450 (1947), reprinted in 31 Mass. L.Q., No. 3 (1946).

³ Acts of 1948, c. 656 (District Court of Springfield, Central District Court of Worcester, First District Court of Eastern Middlesex, Third District Court of Eastern Middlesex); Acts of 1948, c. 667; Acts of 1949, c. 805 (Second District Court of Bristol); Acts of 1951, c. 768 (Municipal Court of Roxbury District); Acts of 1952, c. 603 (District Court of East Norfolk).

⁴ Resolves of 1953, c. 98. Hall, Progress Report on District Court Reorganization, 38 Mass. L.Q., No. 5, p. 33 (1953).

⁵ Senate No. 680, Report on the Special Commission on District Court Reorganization (1954), reprinted in 39 Mass. L.Q., No. 1, p. 65 (1954).

proposal of restricting the hearing of serious civil cases to full-time judges.

The majority of the Commission recognized the undesirability of having part-time judges but believed their complete elimination to be impossible as a practical matter. Dispensing with the present daily criminal sittings in the smaller courts was thought to create serious problems, particularly in the transportation of unbailed criminal defendants. Furthermore, special justices in the full-time courts were believed necessary to permit flexibility in scheduling circuit assignments of the full-time judges on civil cases. A minority of the Commission vigorously protested the perpetuation of part-time judges, calling it "a compromise of the most fundamental objective of reorganization."⁶

The Judiciary Committee reported a bill which differed from the Commission's recommendation chiefly in increasing the number of full-time judges.⁷ The House bill was passed with amendments, but the Senate substituted a resolution for further study by the Judiciary Committee, and the matter died for failure of House concurrence.⁸

One recurring problem which contributed to the failure of the legislation was the status of justices of the Municipal Court of the City of Boston. At present they receive \$12,000 and are not forbidden to practice law. The new full-time judges under all of the proposals considered were to be raised to \$12,000 and to be barred from practicing law. On the one hand, the point was made that the justices of the Municipal Court should now be forbidden to practice law, since all full-time judges should be treated alike. On the other hand, it was urged that the Municipal Court judges should not be left with their present salaries and lose their right to practice law while the new full-time judges received substantial salary increases to compensate for their loss of practice. Each year there were enough earnest proponents of each view to seriously jeopardize passage of the bill in either form.

§27.12. Restrictions on practice by part-time judges. The unsuccessful two-year effort to reorganize the District Courts focused attention upon the problem of the part-time judge who under existing law may sit as a judge one day and act as an attorney the next. The Administrative Committee of the District Courts has by rule eliminated one of the most serious grounds for complaint. Effective October 1, 1954, no justice of a District Court other than the Municipal Court of the City of Boston can practice in motor vehicle tort cases.¹ This provision was originally to be effective on January 1, 1954, but it was suspended because of the pendency of legislation which would have made

⁶ Senate No. 680, Report of the Special Commission on District Court Reorganization 23 (1954).

⁷ House No. 2906 (1954).

⁸ Senate No. 841 (1954).

§27.12. ¹ Requirement No. XVII of the Administrative Committee of the District Courts.

it unnecessary.² When the legislature failed to act, the requirement was put into effect.

In summary, the restrictions upon practice by District Court judges are now as follows:³

1. The justices (this term does not include special justices) of seven of the large District Courts are full-time and are forbidden to engage in law practice.

2. No justice can engage in criminal practice or motor tort practice in any court, nor can he be retained in any case pending in his own court or which has been tried there.

3. No special justice can engage in criminal practice in any court, nor can he practice on the civil side of his own court (except in the seven District Courts serving less than 12,000 people), or in any case in which he has acted as justice. In addition, no special justice can hear a motor vehicle tort case if he is directly or indirectly acting as an attorney in such cases.

§27.13. Juvenile court reorganization. The legislature also considered a proposal to establish a full-time system of juvenile courts. The Special Commission Established to Make an Investigation and Study Relative to the Prevention of Child Delinquency, etc., offered a draft bill which the Governor recommended in his Annual Message.¹ The House Judiciary Committee favorably reported a bill modifying somewhat the Commission's draft.²

The proposal for juvenile courts was part of a continuing effort to meet the problem of juvenile delinquency in the Commonwealth. In 1948, the Youth Service Board was created to assist in the care and treatment of children after their commitment by the courts.³ As a second step, it appeared desirable to establish separate juvenile courts, each administered by a full-time justice with "knowledge of juvenile problems and procedure."

The eight new juvenile division courts would exercise exclusively the present jurisdiction of the District Courts over all cases of juvenile offenders under seventeen years of age. The new juvenile division justices would sit exclusively in the juvenile divisions of the District Courts located within their juvenile division district; but justices and special justices of the District Courts, upon designation by the Administrative

² Administrative Committee of the District Courts, Letter to the Justices, Clerks and Probation Officers of the District Courts 22 (Aug. 12, 1954).

³ These restrictions are found in G.L., c. 218, §17; id. §77A; Supreme Judicial Court, General Rules No. 2 (as of June 30, 1952); Requirement No. V (effective Jan. 1, 1943) and Requirement No. XVII (effective Oct. 1, 1954) of the Administrative Committee of the District Courts. See Twenty-ninth Report of the Judicial Council 56, 65 (1953); Administrative Committee of the District Courts, Letter to the Justices, Clerks and Probation Officers of the District Courts 22 (Aug. 12, 1954).

§27.13. ¹ House No. 2700 (1954).

² House No. 2917 (1954).

³ Acts of 1948, c. 310.

Committee of the District Courts, could conduct sessions of the juvenile divisions in their absence. Although the Special Commission proposed a new Administrative Committee of the Juvenile Courts, the House bill merely provided for the appointment of one of the new justices of the juvenile court to the Administrative Committee of the District Courts. The salaries of the new justices would be \$12,000 a year, payable by the counties, despite the strong recommendation of the Special Commission that the Commonwealth finance the program. Finally, it would be "the duty of each juvenile division justice to assist the communities in his district to co-ordinate existing facilities and to suggest methods which will enable the community to combat problems of juvenile delinquency and to focus the attention of the community on the necessity of an active planned program in the field of prevention of juvenile delinquency."

The bill passed the House with amendments and the Senate with further amendments. The differences between the two versions were trifling, but at this stage powerful voices were raised against the measure,⁴ and the legislature prorogued without attempting to resolve the differences, thus killing the proposal.

D. MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION

§27.14. **The American Bar Association minimum standards.** The American Bar Association has long spearheaded a drive for improved administration of justice. In 1937 and 1938 the Association recommended the adoption of extensive reforms in procedural law.¹ The progress of these efforts has been detailed in *Minimum Standards of Judicial Administration*, a volume edited by Chief Justice Arthur T. Vanderbilt of New Jersey. It may be useful to see where Massachusetts stands with reference to these standards. A rather rough-and-ready statistical appraisal was made four years ago in the *American Bar Association Journal*,² at which time Massachusetts was placed eighth among the states as to the extent of acceptance of these standards.

There are numerous areas, however, where the state falls far short of the Bar Association's ideal. These include the lack of a general rule-making power in the courts, the lack of a unified judicial system with a court administrator, the lack of an effective, court-controlled, non-political method for the selection of jurors, the lack of broad discovery provisions comparable to Federal Rules 26 to 37, the lack of an effective summary judgment procedure, the lack of power in the trial judge to

⁴ Rumblings of discontent, including a criticism from the bench by a municipal court judge, culminated in Archbishop Cushing's public disapproval of the bill. *Boston Herald*, June 7, 1954.

§27.14. ¹ A.B.A., *Reports of the Section of Judicial Administration* (1938), reprinted in Vanderbilt, *Minimum Standards of Judicial Administration*, App. A (1949).

² Porter, *Minimum Standards of Judicial Administration: The Extent of their Acceptance*, 36 A.B.A.J. 614 (1950).

advise the jury on the facts, and various matters in connection with appellate practice.

There will not be unanimity on the proposition that all of the American Bar Association's minimum standards represent goals to which Massachusetts should aspire, although many of them have at one time or another received the approbation of the Judicial Council³ and most of them have been presented to the legislature. The point is that the present system has produced congestion and delay and that any proposals calculated to remedy the situation are entitled at least to thoughtful consideration. New Jersey stands first in the extent of acceptance of the minimum standards, and it is not mere coincidence that it also appears to have done the best job among the states in remedying the congestion of its dockets.⁴

§27.15. Rule-making power. Massachusetts has never entrusted full rule-making power to its courts. Ever since their creation the courts have been authorized to make rules of practice and procedure "consistent with law,"¹ but no power has been conferred to override existing statutes on these matters. In contrast, Congress has given such authority to the Supreme Court of the United States,² and the Federal Rules of Civil Procedure, promulgated pursuant to that authority, have governed procedures in the United States District Courts since 1938. Approximately half the states have granted similar authority.³

There is no single reform so vital to the achievement of a fair, efficient, and inexpensive administration of justice as the vesting of full rule-making power in the courts. The overburdened legislature every year conscientiously considers, through the appropriate committees, a flood of bills designed to remedy particular defects in court procedure. Good legislation often results, but inevitably on a piecemeal basis. The legislature is simply not equipped to give to the working of the judicial system the continuous over-all scrutiny that is necessary to make and keep the system up to date and efficient. The courts are so equipped, and should be given the necessary authority to get rid of archaic rules that remain on the statute books because of legislative inertia rather than from any present belief that they are sound.

Although bills to confer rule-making power on the courts are regularly introduced, the last all-out effort to achieve this reform was in

³ *Judicial rule-making power*, 15th Rep. 11 (1939), 16th Rep. 36 (1940); *selection of jurors*, 23d Rep. 33 (1947), 24th Rep. 19 (1948); 26th Rep. 40 (1950), 29th Rep. 46 (1953); *discovery devices*, 27th Rep. 21 (1951), 29th Rep. 10 (1953); *summary judgment*, 24th Rep. 30 (1948), 25th Rep. 24 (1949), 26th Rep. 8 (1950), 27th Rep. 7 (1951), 28th Rep. 30 (1952), 29th Rep. 34 (1953).

⁴ The speech of Chief Justice Vanderbilt of New Jersey, made before the NACCA Convention in Boston on September 2, 1954, on "Clearing Congested Calendars" should be required reading for lawyers and others who are concerned over the law's delays. It is printed in 39 Mass. L.Q., No. 4, p. 9 (1954).

§27.15. ¹ G.L., c. 213, §3.

² 48 Stat. 1064, 28 U.S.C. §2072 (1934).

³ Vanderbilt, *Minimum Standards of Judicial Administration* 91 (1949). Several states have granted such power since 1949.

1939, when a bill passed the Senate but was rejected in the House, despite a favorable report from the Judiciary Committee.⁴ A few of the arguments for rejection then made are worth mention, as they are likely to recur in any discussion of the matter. First, it was urged that to confer rule-making power on the courts would be an abdication by the legislature. Actually, it is a delegation, not an abdication. The legislature would at any time be free to change by statute a court-made rule of which it did not approve. In New Jersey, it is true, the court has held that the court's rule-making power is exclusive and that the legislature is powerless to abrogate a court rule.⁵ But this decision is the court's interpretation of a provision in the new New Jersey constitution which has no counterpart in Massachusetts. The proposal is for Massachusetts to follow the federal model and that of the other states which preserve the legislature's right to undo what the court has done.

Second, it was denounced as "a rich man's bill." Nothing could be wider of the mark. Its main aim is to relieve congestion in the courts by modernizing procedure, and plainly it is the poor litigant who suffers most from the law's delays. The personal injury plaintiff, for instance, often simply cannot afford to wait for his jury trial and is forced either to waive his jury or make an inadequate settlement. Significantly, the legislature has expressly delegated full rule-making power to the District Courts on small claims, and no complaints have been heard from the "poor man" over the way in which the power has been exercised.

Third, it was urged that the courts had made many rules and "have plenty of rule-making power now." This overlooks the difference between the full rule-making power which is sought and the present limited power to make rules only so far as they are "consistent with law."

A fourth objection to full rule-making is the fear that, given the power, the courts would bodily take over the Federal Rules, which, it is argued, are in many respects unsuitable for Massachusetts practice. Such distrust of the court seems unwarranted. The invariable practice in the exercise of this power by both the Supreme Court of the United States and the state courts has been to appoint an advisory committee from the bench and bar to draft proposed rules, the courts, of course, retaining the right to reject any such proposals. There is nothing in our history to suggest that a representative group of lawyers appointed to such a committee would uncritically accept a set of rules from another jurisdiction or that the courts would go along with such an action if it did.

⁴ For a full account of this effort see *The Rule-Making Bill*, 24 *Mass. L.Q.*, No. 2, p. 8 (1939). The bill had the support of the Judicial Council, substantially all the bar associations, the Boston Chamber of Commerce, and other organizations. Senate No. 48 (1954), like its recent predecessors, died in committee.

⁵ *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406 (1950). See Kaplan and Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 *Harv. L. Rev.* 234 (1951); Pound, *Procedure under Rules of Court in New Jersey*, 66 *Harv. L. Rev.* 28 (1952).

In one minor respect the legislature, even if not ready to go the whole way on rule-making power, could clear up doubts that have arisen over the power of the Superior Court to change the prescribed forms of pleading set forth in General Laws, Chapter 231, Section 147. That section gives such revisory power to the Supreme Judicial Court, and it has been argued that this power is exclusive, so that the Superior Court cannot, for instance, regulate the flagrant misuse of the general denial.

§27.16. Depositions of parties. The Judicial Council in its Twentieth Report (1953) recommended that the depositions of parties be permitted as a matter of right.¹ This, of course, is much more restrictive than the Federal Rules, which allow the unlimited taking of depositions of witnesses also.² The adoption of the Federal Rule in Massachusetts would be open to the criticism that it might be misused, particularly in small cases, to harass parties and subject them to unwarranted expense. Accordingly, the Judicial Council proposed a much more limited objective, namely, the substitution of oral interrogation for the traditional discovery device of written interrogatories to parties—a procedure in which Massachusetts was a pioneer.³ Nevertheless, the proposal was killed in committee.

As a weapon against court congestion this proposal has far-reaching possibilities. It has been shown that the number of cases tried to a conclusion is relatively small.⁴ The question is ordinarily not whether the parties will settle their cases, but when the settlement will take place. In many cases, the jury trial itself is used as a kind of discovery device through which the parties appraise the strength of their adversary's case and thus reach a settlement. Instead of doing this before a jury, at an estimated cost to the taxpayer of \$500 a day,⁵ it could be done under this proposal before a notary public. Moreover, it could be done without sitting out the long delay before the case is reached for trial on a jury list.

Experience under the auditor system in the 1930's, and in pretrial conferences as well, shows that when lawyers get in the same room with their respective files, faced with the necessity of doing something about their cases, settlements occur in a very large proportion of the cases. To the extent that this can be done without taking the time of court and jury, the result is an expediting of the trial list.

Taking depositions of parties and getting the parties together also would facilitate settlements. Moreover, it would enable attorneys to secure information, essential to intelligent settlement negotiations,

§27.16. ¹ Page 10.

² Fed. R. Civ. P. 26(a). For a discussion of the use of discovery under the Federal Rules, see Speck, *The Use of Discovery in United States District Courts*, 60 Yale L.J. 1132 (1951).

³ Practice Act of 1851, G.L., c. 231, §§61-68. For a discussion of discovery in Massachusetts, see Black, *Interrogatories as Pre-Trial Discovery in Massachusetts*, 33 Mass. L.Q., No. 1, p. 9 (1948).

⁴ See Section 27.2 *supra*.

⁵ Section 27.8 *supra*, note 4.

which is so often concealed by adroit answers to written interrogatories.

This proposal is not a panacea for all the ills of congestion. The defendant intent upon utilizing the maximum of delay for the purpose of wearing down his adversary can still wait until he is on the courthouse steps with jury trial imminent before even discussing settlement. But it can be safely predicted that the availability of the suggested deposition machinery would hasten the day of reckoning even for that type of defendant. It certainly seems to be worth a try.

§27.17. Administrator for the courts. The proposal for an administrator for the courts has been widely acclaimed as a businesslike device calculated to improve the efficiency of the administration of justice. A bill based upon a Model Act approved by the Conference of Commissioners on Uniform State Laws was referred to the Judicial Council in 1953.¹ The Council in its Twenty-ninth Report (1953)² did not recommend enactment of the bill, and it was rejected by the 1954 legislature.

The objections to the bill advanced by the Judicial Council were cogent, but the idea behind it, as the Council itself conceded, has genuine merit. The bill shows the difficulties of grafting upon an established judicial system a scheme of a general nature not devised with the particular system in mind. Nonetheless, it seems unfortunate to let the matter rest with the rejection of last year's bill. The further study suggested by the minority of the Council³ might well produce a substitute adapted to the Massachusetts situation.

The Judicial Council expressed the view that if the proposed bill were adopted, its own existence and that of the Administrative Committee of the District Courts and the Administrative Committee of the Probate Courts would no longer be justified.⁴ This conclusion does not seem sound, although the court administrator would take over some of the duties of these bodies, especially the collection and compilation of statistics. All of these bodies have made invaluable contributions to judicial administration, and they should be able to accomplish even more if released from the burden of statistical bookkeeping. Until the time comes when full rule-making power is lodged in the courts, where it belongs, the chief hope for procedural reform will continue to lie in the Judicial Council. The statutes recommended by the Council that are now on the books abundantly demonstrate the need for its continuance.

§27.18. Conclusion. The administration of justice in Massachusetts in the past year has been marked both by an increase in the law's delays and an increase in the determination to do something about it. That the bar and the public are becoming more aroused is a good omen for the future, although the tangible results have so far been small.

The magnitude of the problem must not be underestimated. A ma-

§27.16. ¹ Resolves of 1953, c. 20.

² 29th Rep. 48.

³ Id. at 51B.

⁴ Id. at 50.

jor overhaul, not a mere tinkering with details, is required. Before undertaking drastic remedies, however, we must know as much as possible about the disease we are trying to cure. Despite all the agitation about congestion, we still do not know as much as we should about its causes.

The Judicial Council, with the aid of the clerks of court who are familiar with the basic data, should reappraise its statistical methods, substantially unchanged for many years, to make them more informative.¹ To plead for better statistics is not to suggest that the problems of congestion can be solved by slide rule. Thoughtful statistical analysis should, however, aid in evaluating the remedies already suggested and point the way to further fruitful investigation.

The real concern is to discover what leads litigants, through their lawyers, to make their day-to-day tactical decisions under the existing procedures. Only when this is known will it be possible intelligently to revise those procedures to expedite the administration of justice. What is called for is a broad inquiry into the thinking habits of lawyers,² settlement practices of insurance companies, and the like. This clearly cannot be undertaken by the Judicial Council unless it is given the funds for a staffing adequate to the task. It might be done by a legislative commission if it is given the necessary time and a sufficient appropriation. It might even be a suitable subject for a foundation grant, for congestion is a pervasive problem, and the lessons learned here would have general applicability.

Once the facts are fully explored, the problem must be attacked with vigor, imagination, and a willingness to scrap outworn procedures if they stand in the way of the fair and efficient administration of justice. Only then will "every subject of the commonwealth . . . obtain right and justice . . . completely and without any denial; promptly and without delay."³

§27.18. ¹ Some suggestions for improvement have been made in this chapter. See Section 27.2 *supra*.

² The answers and comments of the 1300 lawyers who replied to questionnaires of the Committee on the District Court Survey are available (with names deleted) as a start toward such an analysis. Particularly revealing are the comments to the question "Do you have any particular rule or theory governing your choice between a district court and the Superior Court?" Preliminary Statement to the Joint Committee on the Judiciary from the District Court Survey Sponsored by the Law Schools of Massachusetts (March 18, 1952).

³ Mass. Const., Declaration of Rights, Art. XI.

